

EU Law Restitution Revisited: In Search of Lost Criteria*

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ABSTRACT: Since *Francovich* it seems the damages remedy has become The Remedy for individuals suffering economic loss by reason of EU law infringements by Member States. There is however an alternative to damages in private enforcement of EU law, in fact an antecedent to *Francovich*: Restitution by reason of a breach of EU law. Nonetheless, the criteria for restitution from a Member State, by reason of its breach of EU law, still remain neglected in comparison to the close attention and debate surrounding the criteria for the damages action against Member States. The purpose of this contribution is thus to identify and to discuss the distinctive elements of restitution as a remedy in the event of a breach of EU law by a Member State. Focus is on the very criteria that constitute legal basis for a claim of restitution from a Member State under EU law and the extent to which those criteria should be governed by EU law or by national law. Less attention is devoted to exceptions from liability to make restitution, although their existence in the case law is duly noted. The criteria identified in the case law are (1) the existence of a substantive right conferred on the claimant by EU law, (2) the existence of a payment from the claimant, collected by or on behalf of the Member State, (3) the incompatibility of the basis of that payment with EU law, and (4) that the payment follows as an inevitable consequence of the breach of EU law by the Member State. Case law hints on the more precise legal content of the criteria are examined in an attempt to shed light on their proper interpretation and application. It is noted that the second and third criteria cannot, on the basis of existing case law, be defined with precision. In that connection it is discussed whether the second criterion should be subdivided into two criteria: Impoverishment of the claimant and enrichment of the Member State. As regards to the fourth criterion it is noted that it is

* Date of Reception: 08 July 2017. Date of Acceptance: 26 July 2017.

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uncertain whether it applies at all. Finally it is submitted that some of the difficulties could be overcome if the Court of Justice were to distinguish clear cases of repayment of charges levied by a Member State institution or agency in breach of EU law from more difficult cases of possible liability by reason of the unjust enrichment of Member States.

KEYWORDS: EU law, Restitution, Member State liability, criteria, recovery of unlawful charges